BANDARA AND ANOTHER
v.
PREMACHANDRA, SECRETARY, MINISTRY OF LANDS, IRRIGATION AND MAHAWELI DEVELOPMENT AND OTHERS

SUPREME COURT.
FERNANDO, J.
PERERA, J. AND
WIJETUNGA, J.
S.C. APPLICATION NO.213/93
JUNE 8TH, 9TH AND 23RD, 1993.

Fundamental Rights – Probation – Course for Bachelor's Degree in Surveying – Trade Union Action – Misconduct – Tender of sick notes – Vacation of Post – Termination of Services – Applicability of Establishment Code – Constitution, Article 55(1) – Discrimination – Constitution, Article 12.

The 22 petitioners along with 15 others were selected to follow a four-year residential course leading to the award of a Bachelor's degree in the Surveying Service. Only Class III, Grade III Surveyors were eligible to follow this course. The 1st respondent issued letters of appointment appointing them as Surveyors in Class II Grade III on probation for a period to be notified (but not notified). Shortly thereafter the petitioners became members of the Government Surveyors' Association, a Trade Union. The Annual General Meeting of the Association was held on 26.09.92 and the petitioners attended this meeting with some difficulty. Thereafter the Union embarked on a work-to-rule campaign and sent in sick notes for their absence. The petitioners joined in this: a vacation of post notice was served on them. Later the petitioners submitted a petition to the 1st respondent pleading excuses for having complied with the decision of the Union. The 2nd

respondent interviewed the petitioners and indicated willingness to reinstate them, if they furnished a written undertaking:

(i) to refrain from participating in Trade Union activities during the four year training period; and

(ii) to devote themselves exclusively to educational activities.

The petitioners gave this undertaking by letter which specifically referred to the 2nd respondent's request for such an undertaking. The 2nd respondent did not reply or deny the statement attributed to him. However in his affidavit to court he denied the statement but the court did not accept the denial.

Held:

(1) It was on account of participation in trade union activity that the 2nd respondent (Surveyor-General) informed the petitioners that their services had been terminated.

(2) The misconduct of the petitioners was such that it had to be dealt with under the Establishments Code.

(3) The 'pleasure principle' in Article 55(1) of the Constitution is subject to the equality provision of Article 12 and mandates fairness and excludes arbitrariness.

(4) The power to make rules under Article 55(4) is subject to the provisions of the Constitution, including Article 12 and the Constitution rests on the rule of law. The conditions on which powers of the Cabinet have been delegated are contained in Chapter 11, Section 11 of the Establishments Code. In the Establishments Code "without assigning any reason" only means that no reason need be stated to the officer but that a reason, which in terms of the Code justifies dismissal, must exist; and when the law requires disclosure of such reason, it will have to be disclosed – and, if not disclosed legal presumptions will be drawn. The Cabinet has delegated a power to dismiss for cause, and according to the procedure prescribed.

(5) Where others have been treated differently the burden on the respondents was to establish not just any difference between the petitioners and other groups or classes but a rational basis for differences in treatment. If the other officers were leniently treated, the petitioners should have been subjected to a much lesser punishment than dismissal; and dismissal was unreasonable, arbitrary and discriminatory.

(6) The petitioners had not been dismissed by the proper authority; that the 2nd respondent improperly deprived them of their right under Chapter V, Section 7:4

(of the Establishments Code). The petitioners were improperly and unlawfully prevented by the respondents from resuming their studies and work; Action was taken against them not for misconduct but for participating in trade union activity (and not because such activity was considered unlawful or improper). The fundamental rights under Article 12(1) have been violated. They are entitled to reinstatement and to resume their course of studies forthwith, retaining seniority over students subsequently admitted to that course of studies.

Per Fernando, J.:

"The State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is realised."

Cases referred to:

1. *Abeywickrama v. Pathirana* [1986] 1 Sri LR 120, 139, 149.
2. *Chandrasiri v. A.G.* [1989] 1 Sri LR 115.
3. *A.G. v. Keyser's Royal Hotel* [1920] AC 508, 526, 539, 554, 562.
4. *Perera v. Jayawickrama* [1985] 1 Sri LR 285.
5. *De Alwis v. Gunawardena* SC 7/87 – SC Minutes of 28.3.88.

APPLICATION for infringement of fundamental rights.

H. L. de Silva P.C. with *Elmo Perera* and *M. M. Musafer* for the petitioners.

Shibley Aziz P.C. Solicitor-General with *A. S. M. Perera* D.S.G. for the respondents.

Cur adv vult.

August 16th, 1993.
FERNANDO, J.

On 30.7.92, the 22 Petitioners, together with 15 others, were selected (on the basis of G.C.E. (A.L..) performance) to follow a four-year residential course leading to the award of a Bachelor's Degree in Surveying Science, by the Institute of Surveying and Mapping, Diyatalawa ("ISM"), a Degree-Awarding Institute. Only Class III, Grade III Surveyors were eligible for that course, which commenced on 24.8.92. The 1st Respondent, the Secretary, Ministry of Lands, Irrigation and Mahaweli Development, issued letters of appointment

(P3) dated 24.8.92 to each Petitioner, appointing him as a Class III Grade III Surveyor in the Sri Lanka Surveyors' Service; appointment was stated to be on probation for a period to be notified (but this was not done); and was subject to termination with one month's notice for –

(a) failure to pass the degree examination of the ISM:

(b) failure to obtain the required number of marks at the end of each quarter;

(c) unsatisfactory conduct during probation; or

(d) inefficiency during probation.

It was expressly stated in P3 that if the required language proficiency was acquired, and if service during probation was satisfactory, the appointment would be confirmed in terms of Chapter II, Section 11, of the Establishments Code, which provided:

"11. Probation

11:1 Every appointment to a Permanent post will be on probation for a period of three years.

11:2 Appointment on probation implies that the officer may, before confirmation, count on being admitted to the permanent establishment if he carries out the obligations imposed by his letter of appointment and proves by conduct and efficient service, his suitability for permanent retention in the Public Service. Appointment on probation makes possible the elimination of a person against whom definite misconduct cannot be urged and who, for temperamental and other defects, should be released from the Public Service, before it is too late for him to find other employment.

11:2:1 The following procedure should be followed in the case of an officer appointed on Probation:–

He should be regarded as being on Probation with a view to learning work and being tested for his suitability for permanent retention.

He should not only be given all facilities for acquiring experience in his duties, but also be under continuous and sympathetic observation and guidance.

If during his period of probation, he shows any tendencies which render doubtful his suitability for permanent retention, he should at once be warned and given such assistance as may be possible to correct his failings. Any admonition administered for any serious act or omission or any fault of conduct or character which, if persisted in, may prevent his confirmation, should be communicated to him in writing and an acknowledgement obtained, so that no question may subsequently arise as to whether the officer was warned of his failing and given an opportunity of improvement . . . .

11:4 During the period of Probation the Appointing Authority will have the power to terminate the officer's appointment without assigning any reason . . .

11:5 If at the end of the period of probation . . . the officer's work and conduct are judged to have been satisfactory, and if he has fulfilled all the requirements for confirmation in that appointment, he should be confirmed in his appointment by the appropriate authority.

Shortly thereafter, the Petitioners became members of the Government Surveyors' Association ("the Union"), a duly registered trade union, and with some difficulty obtained leave to attend the Annual General Meeting held in Colombo on 26.9.92; leave having been refused by the 3rd Respondent, the Director, ISM, at the last moment, the 2nd Respondent, the Surveyor-General, granted such leave. That Union thereafter embarked on trade union action, in support of certain demands, commencing with a work-to-rule campaign from 7.12.92. Quite inapproriately, the initial stage of the

work-to-rule was an abstention from work for two weeks by all members, after submitting applications for sick leave for that fortnight. The Petitioners say that the first part of their course (a three-month intensive English Course), had been completed by the end of November, 1992, and that the next stage was due to commence in January 1993, so that there was no work scheduled for them in December. Apart from a general denial by the 2nd Respondent, there was not even a suggestion by the Respondents that there were any lectures, practicals, field-work, or other activities scheduled for December. It is not disputed that the disciplinary rules required the Petitioners to get written permission from their lecturer-in-charge in order to leave the ISM. The Petitioners say that in accordance with the prevailing practice, they made entries in a leave register maintained for the purpose; they also sent telegrams requesting leave on the ground of illness, and these were received before 11.12.92; they sent medical certificates, which were all received long after 11.12.92. It is virtually a certainty that none of the Petitioners were in fact ill, and that medical certificates had been obtained from medical practitioners who were either dishonest or deceived.

Learned President's Counsel for the Petitioners contended, with little enthusiasm, that submitting false sick-notes and medical certificates was legitimate trade union action, as part of a work-to-rule campaign. I have equally little hesitation in rejecting that contention. This Court will not condone the conduct of an employee who lies to, or otherwise deceives, his employer as to the reason, for his failure to work, whether individually or collectively; that it was "trade union action" aggravates rather than mitigates such misconduct. An employer would be justified in taking disciplinary action in respect of such misconduct. But for the fact that the Petitioners have already suffered considerably by a six-month interruption in their course of studies, I would have expressly reserved to the Respondents the right to take this misconduct into account, in determining whether they should be confirmed upon completion of probation. However, without dealing with the Petitioners for that misconduct, it seems to me (for the reasons I have set out later in this judgment) that the 1st and 2nd Respondents chose instead to take action against them for participation in trade union activity.

The Termination of the Petitioners' Services

By letter dated 11.12.92 (P4) the 2nd Respondent informed the Petitioners that the 1st Respondent had terminated their services, and their course of studies, with effect from 7.12.92: no reason was stated. The Petitioners contended that the 1st Respondent had not in fact decided to terminate their services, pointing out that there was no document or affidavit from the 1st Respondent stating or suggesting that he had taken such a decision. The learned Solicitor-General submitted, in reply, that there was a record of a discussion at which the 1st and 2nd Respondents were present, and that the 1st Respondent had decided to dismiss the Petitioners, and had directed the 2nd Respondent to so inform the Petitioners. Learned President's Counsel stated that he would not object to the production of that document, if the Petitioners were permitted to produce a photocopy of a letter dated 29.1.93 from the 1st Respondent to the Secretary to the President. The learned Solicitor-General had no objection. Accordingly, a letter dated 16.12.92 from the Assistant Secretary (Administration) of the Ministry of Lands, Irrigation and Mahaweli Development, to the 2nd Respondent, and the annexed minutes of the discussion held on 11.12.93 was produced as 1R1 and 1R1A; and the letter dated 29.1.93 was produced as P38. According to 1R1A, the absence of Surveyors after submission of sick-notes, and their demands, was discussed; thereafter, the participation of the ISM students in this trade union action was considered. It was then decided to withdraw State vehicles from the Surveyors; and to entrust urgent work to private Surveyors. In regard to the students it was decided (I will assume, by the 1st Respondent) "to terminate their services and training with immediate effect if they do not attend lectures". The learned Solicitor-General made a valiant effort to convince us that the Sinhala phrase "ක® ඉද්ගනා වලට සහභාගි නොවන්නේ නම්" must be taken, in context, to refer to their **past** conduct in being absent from the ISM without leave; and that the reference to **lectures** was a mere misdescription. These are explanations which the 1st and 2nd Respondents and the marker of 1R1A have not chosen to place before this Court by affidavit. The plain meaning of 1R1A is that there was no immediate termination of services, but that, if the students did not attend lectures after 11.12.92, their services should then be immediately terminated.

Copies of P4, and presumably also of 1R1 and 1R1A, had been sent to the 1st Respondent. However, in P38 the 1st Respondent gave quite a different version of the decision taken on 11.12.92. Having referred to the terms and conditions of P3, and the liability of the Petitioners to termination for breach, he stated that because they had not behaved with the responsibility expected of those in the public service, and had set a bad example, they were deemed to have vacated post with effect from 7.12.92. Here again I am unable to accept the learned Solicitor-General's contention that in a comprehensive report to the Secretary to the President, a senior public officer holding the post of Secretary to a Ministry used the Sinhala equivalent of "deemed to have vacated post" loosely, when all he meant to say was "terminated". I can well understand why the 1st Respondent prudently refrained from tendering an affidavit to this Court putting forward such an implausible explanation. Further, if it was vacation of post, the reference to 7.12.92 was quite appropriate, for that was the day on which the Petitioners commenced keeping away from work. But if the decision was to terminate, then 7.12.92 was inappropriate; especially as P3 required one month's notice.

According to P4, the service of the Petitioners had been terminated with effect from 7.12.92; according to 1R1A, the decision was to terminate if the Petitioners did not attend lectures (i.e. in the future); but according to the 1st Respondent himself, as he stated in P38, he decided that they be deemed to have vacated post. I hold that the 1st Respondent's decision was not to dismiss the Petitioners, but to treat them as having vacated post.

Chapter V, Section 7:1, of the Establishments Code provides that "an officer who absents himself from duty without leave will be deemed to have vacated his post from the date of such absence and he should be informed accordingly at once." Section 7:4 enables the officer to submit an explanation; such explanation must be considered by the Disciplinary Authority, although ultimately it may or may not be accepted by that Authority; thus a vacation of post notice does not at once result in a final and irrevocable severance of the employment relationship, but leaves the employee a chance of being reinstated. There is no similar provision applicable to the termination of an appointment. By incorrectly informing the Petitioners that their

services had been terminated, the 2nd Respondent deprived the Petitioners of their right to submit an explanation in respect of their "vacation of post", which might have been accepted by the Disciplinary Authority.

I have now to consider the real reason for the purported dismissal of the Petitioners, which the events of the next few weeks revealed. The Petitioners submitted a petition dated 16.12.92 to the 1st Respondent, through the 2nd Respondent, pleading that, without a proper understanding of the gravity of the matter and without an opportunity of obtaining advice from their parents and elders, they had complied with the decision of the Union. They reported for work on 21.12.92, but were not allowed to do so. On 5.1.93 two Petitioners interviewed the 2nd Respondent, who, according to them, indicated his willingness to reinstate them, if they furnished a written undertaking:

(i) to refrain from participating in Trade Union activities during the four year training period; and

(ii) to devote themselves exclusively to educational activities.

The Petitioners gave this undertaking by letter dated 6.1.93 (P10), which specifically referred to the 2nd Respondent's request for such an undertaking. The 2nd Respondent did not reply to P10 or deny the statement attributed to him. However, in his affidavit sworn on 24.5.93, he stated that he did not request any such written undertaking, but that the Petitioners on their own tendered such an undertaking. I cannot accept his version in view of his failure promptly to contradict P10. On 10.1.93, the "Sunday Observer" carried a report of a press interview in which the 2nd Respondent had stated that the Union had dragged 37 students into its campaign "and their future is bleak because all of them have been discontinued"; and that the Union had "forced them to extend support to the [Union] campaign". He did not suggest that discontinuance was because they had submitted false sick notes or medical certificates, or for any other misconduct. Thereafter, on 3.2.93, parents and guardians of the Petitioners met the Minister, who indicated that a settlement would not be possible so long as the

trade union action continued, and that they should "create an environment favourable to . . . a settlement". Presuming that the Minister meant a cessation of the Union's trade union action, the parents requested the Union to call off their campaign. By letter dated 5.2.93, the Union informed the Minister that they had suspended the work-to-rule for 10 days from 10.2.93; and, subsequently, until 10.3.93. It is quite clear that it was on account of participation in trade union activity that the 2nd Respondent informed the Petitioners that their services had been terminated.

Applicability of the Establishments Code

Although the learned Solicitor-General contended that a probationary appointment could be terminated under Chapter II, Section 11:4, and Chapter V, Section 6:2, of the Establishments Code "without any reason being assigned", at the same time he submitted that other provisions of the Code (especially Chapter II, Section 11:2:1) were inapplicable to the Petitioners because of the gravity of their misconduct; and accordingly their services could have been terminated without the guidance, admonitions, and warnings provided for in Section 11:2:1. There may perhaps be some extremely serious, persistent and flagrant acts of misconduct which demonstrate that the culprit is so completely beyond redemption, that guidance, warnings and opportunities for reform would be futile. If rebels and insurgents can be rehabilitated and reinstated in public employment,, why not youth who engage in improper strike action? While in an appropriate case I would be prepared to consider the possibility of such an exception to the Code, the misconduct of the Petitioners is certainly not of that nature; Section 11:2:1 was intended to apply even to "serious acts, omissions, and faults . . . which if persisted in would prevent confirmation." The Petitioners' misconduct does not suffice to justify the recognition of an exception which would introduce anomalies, discrepancies, and uncertainties into a Code, one principal objective of which was to ensure uniformity and certainty.

Article 55 (1) of the Constitution

The learned Solicitor-General submitted that the Petitioners held office "at pleasure" within the meaning of Article 55(1) of the

Constitution; that the Government cannot by rules made under Article 55(4), or by contract, restrict or override its constitutional prerogative of dismissal at pleasure *(Abeywickrema v. Pathirana,*[1] which I followed in *Chandrasiri v. A.G.,*[2] in considering the scope of the much wider provisions of section 106(5) of the 1972 Constitution); that Chapter II, Section 11:4, and Chapter V, Section 6:2, of the Establishments Code recognise that the Appointing Authority was entitled to terminate a probationary appointment "without assigning any reason", i.e. at pleasure; and that any such termination could not be questioned in these proceedings.

Article 55 provides:

> "(1) Subject to the provisions of the Constitution, the appointment, transfer, dismissal and disciplinary control of public officers is hereby vested in the Cabinet of Ministers, and all public officers shall hold office at pleasure."
>
> "(4) Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters relating to public officers, including the formulation of schemes of recruitment and codes of conduct for public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers.
>
> "(5) Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126 no court or tribunal shall have power or jurisdiction to inquire into, pronounce upon or in any manner call in question, any order or decision of the Cabinet of Ministers, a Minister, the Public Service Commission, a Committee of the Public Service Commission or of a public officer, in regard to any matter concerning the appointment, transfer, dismissal or disciplinary control of a public officer."

These are proceedings under Article 126(1); the question whether the purported dismissal of the Petitioners was a violation of Article 12(1), 14(1) (c) or 14(1) (d) can be examined in those proceedings; and it is therefore unnecessary to consider the precise scope of the preclusive clause contained in Article 55(5).

It may well be that in the United Kingdom the prerogative in regard to office held at pleasure was very wide. However, any such prerogative recognised or conferred under a written Constitution, such as ours, with a separation of functions, must necessarily be subject to limitations. Article 55(5) makes the "pleasure principle" subject to the fundamental rights and the language rights; Article 55(1) makes it "subject to the provisions of the Constitution", so that other limitations may be found elsewhere in the Constitution. The concept of holding office at pleasure suggests, *prima facie*, that dismissal may be for a reason – good, bad, or indifferent – or without any reason. However, "since Article 55(1) is subject, *inter alia*, to Article 12, dismissal, even by the Cabinet of Ministers, cannot be for a reason which involves a denial of equal protection, violative of Article 12(1), or an infringement of Article 12(2). Even if the reasons for dismissal are not stated, upon a challenge under Article 12, a consideration of those reasons becomes almost inevitable; an assertion that there were no reasons would amount to an admission that it was arbitrary; and a refusal to disclose reasons would tend to confirm a *prima facie* case of discrimination made out by the Petitioners. Thus the "pleasure principle" contained in Article 55(1) is necessarily subject to significant limitations, which were lacking in section 107(1) of the 1972 Constitution. The subjection of Article 55 (1) to the equality provision of Article 12 mandates fairness and excludes arbitrariness. Powers of appointment and dismissal are conferred by the Constitution on various authorities in the public interest, and not for private benefit, and their exercise must be governed by reason and not caprice; they cannot be regarded as absolute, unfettered, or arbitrary, unless the enabling provisions compel such a construction.

Further, even in the United Kingdom, it has been recognised that where a matter that could be dealt with under the prerogative is covered by statute, the statute prevails; statutory conditions and restrictions apply to the exercise of the prerogative; and the prerogative is to some extent superseded *(AG v. de Keyser's Royal Hotel)* [3]. While section 107 was not subject to any limitation, Article 55(1) is "subject to the provisions of the Constitution"; and hence has to be read with Article 55(4), which authorises the making of rules relating to "all matters relating to public officers", and regarding the

procedure for the exercise of the power of dismissal; the grounds and the procedure for dismissal appear to be included.

If a public officer is appointed by the Cabinet, under and in terms of rules made under Article 55(4) (or under a contract or letter of appointment issued in terms of such rules), it seems to me that several, as yet unresolved, questions arise:

(a) Is the Cabinet in exercising the "pleasure principle" obliged to abide by such rules (or the contract)?

(b) Even if those rules are not binding on the Cabinet, can they be regarded as void? Or is it that the Cabinet would have an option, in regard to dismissal, **either** to rely on the "pleasure principle" (in which event the dismissal would be partially excluded from review under Article 55(5), **or** to act under and in terms of the rules (or the contract)?

(c) If the Cabinet opts to act under the rules (or the contract), must any issue arising for determination be decided on the basis of such rules (or the contract), and if the dismissal cannot be justified on that basis, is the State then precluded from falling back on the "pleasure principle"?

(d) Even if an exercise of the prerogative, in a manner contrary to the provisions of the rules (or the contract), would result in a valid dismissal and an effective severance of the employment relationship, would the employee nevertheless be entitled to compensation or other relief, short of reinstatement?

However, here the Respondents rely on a purported dismissal by the 1st Respondent, and not by the Cabinet. Counsel assumed, for the purposes of argument, that the power of appointment had been duly delegated to the 1st Respondent, and that accordingly the power of dismissal was also vested in him. The 1st Respondent could therefore have no greater power of dismissal at pleasure than the Cabinet of Ministers, and accordingly, his acts must necessarily be subject to review to the same extent. Further, his powers would be limited by the terms of the delegation, and hence we asked the learned Solicitor-General whether he had been delegated the plenary

power of dismissal at pleasure, or a lesser power. His reply was that the conferment of a power, under Chapter II, Section 11:4, and Chapter V, Section 6:2, to dismiss "without any reason being assigned" constituted a plenary delegation of the Cabinet's power to dismiss at pleasure. I cannot accept this contention. The power to make rules under Article 55(4) is subject to the provisions of the Constitution, including Article 12; and the Constitution rests on the Rule of Law. Rules made under Article 55(4) must be interpreted so as to avoid inconsistency with Article 12 and the Rule of Law, even if dismissal "without any reason being assigned" might, at other times or in other contexts, have been equated to "dismissal without any reason". I hold that the conditions on which powers have been delegated are contained in Chapter II, Section 11. Sections 11:2 and 11:5 confer an entitlement to confirmation, upon fulfilment of certain conditions; Section 11:2 makes the public officer liable to termination for misconduct and other "defects"; all this is inconsistent with any discretion to authorise dismissal "at pleasure". It is in that context that Section 11:4 must be interpreted.

I am of the view that in the Establishments Code "without assigning any reason" only means no reason need be stated to the officer, but that a reason, which in terms of the Code justifies dismissal, must exist; and when the law requires disclosure of such reason, it will have to be disclosed – and, if not disclosed, legal presumptions will be drawn. I hold that the Cabinet has only delegated a power to dismiss for cause, and according to a procedure prescribed (e.g. Chapter II, Section 11:2:1).

In any event, it was not the Respondents' case, according to the documentary evidence, that the 1st Respondent acted on the "pleasure principle"; P38 shows that he acted on the contract of employment, and perhaps also the Establishments Code. He cannot now seek to fall back on the "pleasure principle".

Discrimination contrary to Article 12(1)

The 2nd Respondent incorrectly informed the Petitioners that the 1st Respondent had decided to terminate their services. They were deprived of their right to submit an explanation under Chapter V,

Section 7:4, of the Establishments Code. On 21.12.92 they were not permitted to resume their work and studies. Such treatment denied them the equal protection of the law, as the Establishments Code was intended to afford uniform treatment to public officers. I do not think it necessary that in order to prove discrimination the Petitioners should have adduced proof of instances in which other public officers who were absent without leave were deemed to have vacated post, for that is a matter of common occurrence, demanding judicial notice; and I would have regarded *Perera v. Jayawickreme*[4], as inapplicable. However, in this case, the Petitioners rely on additional matters to prove discriminatory treatment without a rational basis for differentiation:

1. In 1989, 1990 and 1991, trainee surveyors, while on probation, indulged in similar trade union action, and the only consequence they suffered was the suspension of their training programmes for two weeks;

2. In December 1992,

   (a) about 80 Class III, Grade III Surveyors on probation, not being students at IMS, and

   (b) about 1,000 other officers (confirmed and permanent),

   participated in the same trade union campaign, but no disciplinary action whatsoever was taken against them.

The learned Solicitor-General seeks to justify the difference in treatment on the basis that –

1. Unlike trainees in previous years, the Petitioners were admitted to the ISM course enjoying the benefits of a monthly salary and residential accommodation, and without having served the Department for even a day;

2. the Petitioners' acts of indiscipline were extremely serious, especially because they were committed while still on probation;

3. the Petitioners were not entitled to expect that acts of indiscipline would continue to be treated as leniently as in the past; and

4. unlike the Petitioners who were merely following a course of studies, the other officers had duties to perform in relation to the public; their dismissal would have caused serious disruption and inconvenience to the public and the public service.

The burden on the Respondents was to establish not just any difference between the Petitioners and the other groups or classes, but a rational basis for differences in treatment. I entirely agree that the Petitioners were not entitled to expect that unlawful acts would continue to be condoned or leniently treated; and that an employer may be justified in assuming that probationers guilty of indiscipline during probation (i.e. a period when they know they are being closely observed), are likely to be more indisciplined after confirmation. However, there is no doubt that the other groups were also guilty of acts of indiscipline; even senior officers, of much greater experience, maturity and responsibility were guilty of the same act; further, some of them were the instigators of the campaign, while the students were "dragged in" and "forced to extend support"; and the 1st and 2nd respondents described the conduct of the senior officers in the "Sunday Observer" interview in these terms:

> "Some of the demands are outside our purview. Some are trivial, parochial, ridiculous and irresponsible . . .
>
> . . . this kind of unethical and irresponsible behaviour will take them nowhere."

The learned Solicitor-General admitted that in the case of the students their absence from work did not prejudice the public or interfere with their studies; and that in the case of the other officers, inconvenience to the public was inevitable. He contended, however, that it was not practicable to dismiss them. It seems to me that the justification, if any, for treatment meted out to the Petitioners was discipline. Even if I assume that dismissal was both appropriate and proportionate, Article 12 required, also in the interests of discipline, that disciplinary action be taken against all others who were guilty of

similar misconduct. Even if I assume further that the conduct of the others was not more serious, and that the maintenance of services to the public made their dismissal impracticable, yet **some** disciplinary action was imperative, especially against the instigators. However, here, no disciplinary action whatsoever was taken against the other officers (and I do not regard the withdrawal of a facility, such as State vehicles, as a punishment). To put in another way, if the other officers were so leniently treated, the Petitioners should have been subjected to a much lesser punishment than dismissal; and dismissal was unreasonable, arbitrary and discriminatory.

I therefore hold that there was no rational basis for the difference in treatment.

Aricle 14 (1) (c) and 14 (1) (d)

Although leave to proceed was granted only in respect of Article 14(1) (d), the learned Solicitor-General consented to the Petitioners rights under Article 14 (1) (c) being considered. It is quite clear that the purported dismissal of the Petitioners was on account of their participation in trade union action, and not on account of any misconduct or considerations therewith. Learned President's Counsel submitted that the right to form and join a trade union should not be narrowly interpreted, and that it includes the concomitant right freely to engage in lawful trade union activity *de Alwis* v. *Gunawardena* [5], However, Article 14 (1) (c) is of general application to all forms of associations, including trade unions; and not only to the initial act of forming or joining an association, but to continuing membership and participation in the lawful activities of the association.

Had the Petitioners been dealt with for engaging in lawful and proper trade union activity. I would have had no hesitation in granting them relief. But here their conduct has been tainted with misconduct or impropriety. Since I hold that they are entitled to relief under Article 12 (1), I refrain from granting them relief under Article 14 (1) (c) and (d).

I hold that the Petitioners had not been dismissed by the proper authority; that the 2nd Respondent improperly deprived them of their right under Chapter V, Section 7:4; that the Petitioners were improperly and unlawfully prevented by the Respondents from

resuming their studies and work; that such action was taken against them, not for misconduct, but for participating in the trade union activity (and not because such activity was considered unlawful or improper); and that their fundamental rights under Article 12(1) have been violated. I order their reinstatement with effect from 7.12.92, with arrears of salary from 21.12.92; they will be entitled to resume their course of studies forthwith, retaining seniority over students subsequently admitted to that course of studies.

The State must, in the public interest, expect high standards of efficiency, service and fairness from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is realised. We are here dealing with provisions of the Constitutions and rules thereunder, embodying safeguards intended to ensure that the administration reciprocally extends to public officers, like standards of just, equitable, and fair treatment in order to enable them to serve the public as they should, without being unfairly troubled about their tenure and prospects. Those standards we have to enforce even in regard to errant public officers. The conduct of the Respondents has fallen short of those standards, not through mistake or inadvertence, but wilfully. The relief awarded to the Petitioners must reflect our disapproval of that conduct. I direct the State to pay each Petitioner compensation in a sum of Rs. 2,000/- in respect of the infringement of Article 12 (1).

The 2nd Respondent was mainly responsible for the purported dismissal, the denial of an opportunity to submit an explanation, and the failure to reinstate the Petitioners, despite receiving the undertaking sought by him. He was thus responsible for this litigation, and it would have been just and equitable to have required him to pay the costs incurred by the Petitioners. However, in this instance I refrain from making such an order solely because of the Petitioners' own lapses.

PERERA, J.– I agree.

WIJETUNGA, J.– I agree.

Relief ordered.